Supreme Court, U.S.
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No. 00-1514

In the
Supreme Court of the United States

Lance Raygor and James Goodchild,
Petitioners,

v.

Regents of the University of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONERS' REPLY BRIEF

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(1) Respondents insist that the Minnesota Supreme Court did not decide any constitutional question; they assert that that court never held section 1367(d) unconstitutional (R.Br. 1), but merely construed that federal statute to be inapplicable to the instant case. (R.Br. 5, 13).

The constitutional basis of the decision below, however, is absolutely clear:

> We conclude that the application of the tolling provision violates the Eleventh Amendment, because the Eleventh Amendment prohibits Congress from extending the state's liability to suit in state court via the state's unconsented presence in federal court. (App. A-9).
>
> [W]e conclude that application of section 1367(d) to toll the statute of limitations . . . is an impermissible denigration of the University's Eleventh Amendment immunity. (App. A-13).
>
> Extension of the University's exposure to suit in state court because a claim barred by the Eleventh Amendment has been filed against it in federal court is an infringement on the University's Eleventh Amendment immunity. (App. A-14).

In the alternative, respondents suggest that the Minnesota Supreme Court declared section 1367(d) unconstitutional, not "on its face", but only as applied. (R.Br. 4). The decision of that Court, however, undeniably holds section 1367(d) unconstitutional as applied to <u>any</u> state defendant, regardless of the facts of any particular case.

(2) In the court below, respondents advanced an alternative, non-constitutional argument, contending that section 1367(d) does not apply to this case because the federal district court never had subject matter jurisdiction over the state law claim at issue. In their Brief in Opposition respondents appear to suggest that the decision of the

Minnesota Supreme Court actually rested on this ground. (R.Br. 5, 13).

The Minnesota Supreme Court, however, made crystal clear that it was not deciding the case on this basis.

> [T]he [Minnesota] court of appeals determined that when a state law claim asserted in federal court is subject to an Eleventh Amendment immunity defense, the federal court has jurisdiction over that claim until the state defendant successfully asserts the Eleventh Amendment and the claim is dismissed. The University, on the other hand, argues that the Eleventh Amendment automatically bars federal jurisdiction until immunity is waived. We need not answer this quintessentially federal question because, as explained below, our holding is not based on whether jurisdiction temporarily attaches.

(App. A-9)(Footnote omitted).

If the Minnesota Supreme Court had indeed determined that the Eleventh Amendment is an absolute bar to federal jurisdiction, such a decision would be in square conflict with the recent decision of the Ninth Circuit in *Katz v. Regents of University of California*, 229 U.S. 831 (9th Cir. 2000), *cert. denied*, --- U.S. --- (May 14, 2001). In *Katz* the plaintiffs asserted in federal court a claim under the ADEA against a state agency; a jury returned a verdict in favor of the defendant. While the plaintiffs' appeal was pending in the Ninth Circuit, this Court decided *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). In light of *Kimel* the plaintiffs then asked the court of appeals to dismiss the entire case for lack of subject matter jurisdiction, thus eliminating the *res judicata* effect of the earlier adverse jury verdict, and leaving the plaintiffs free to file a new state law action in state court. The Ninth Circuit concluded, properly in our view, that federal courts do have subject matter jurisdiction over claims against state agencies until and unless the defendant

successfully asserts an Eleventh Amendment defense. 229 F. 3d at 834.

Although respondents might seek to renew this argument as an alternative ground for affirmance, it is clearly insubstantial.

> The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381,389 (1998). The federal court proceedings in this case were entirely consistent with *Schacht*. When the case was filed in federal district court in August 1996, the University initially opted--as it has in other cases[1]--to litigate the case on the merits. Rather than moving to dismiss, respondents first took and responded to discovery[2] and engaged in mediation. Only after doing so did the University in June1997 decide to assert

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[1] *E.g., Richmond v. Board of Regents of the University of Minnesota*, 957 F. 2d 595 (8th Cir. 1992)(state discrimination claim not dismissed until Title VII and other federal claims dismissed on summary judgment); *Eldeeb v. University of Minnesota*, 864 F. Supp. 905 (D.Minn. 1994)(No Eleventh Amendment/*Pennhurst* argument asserted; summary judgment sought and granted on merits of state discrimination and negligence claims).

[2] Respondents served 22 interrogatories seeking, among other things, detailed information about petitioners' contentions in their complaints, age discrimination evidence, damages, prior psychological history and therapy, medical providers, employment histories, witnesses, experts, and document identification. Also, respondents served 21 document requests for information about the terms and conditions of employment, income tax returns, resumes, medical records, employment records, damages, personal notes or journals, and documents which supported petitioners' contentions in their complaint. Finally, respondents requested any statements as defined in the Federal Rules of Civil Procedure.

its Eleventh Amendment defense.[3] Under *Schacht* the assertion of that defense certainly did not wipe out, *nunc pro tunc*, the jurisdiction that had existed during the previous year.

(3) Strikingly absent from the Brief in Opposition is any effort to defend or even explain the radical and unprecedented expansion of the Eleventh Amendment adopted by the Minnesota Supreme Court.

This Court has invalidated federal legislation under the Eleventh Amendment only where the federal statute in question attacked directly a state's right to determine whether it would be subject to the coercive process of judicial tribunals at the instance of private parties. *Alden v. Maine*, 527 U.S. 706, 749 (1999). In cases such as this, however, the Minnesota legislature has both chosen to permit suits against state agencies and selected the very judicial forum--state courts--in which petitioners now seek to bring suit. This action was commenced within the requisite 45 days, and Minnesota law certainly permits claims under the Minnesota Human Rights Law to be litigated in federal court, albeit subject to the discretion of a state agency to assert an Eleventh Amendment defense. The only state interest affected here is the tactical advantage a defendant agency might enjoy if plaintiffs were unable even to attempt to bring pendant state claims in federal court. This falls far short of the core state interests at stake in *Alden v. Maine*.

Because section 1367(d) concerns the interrelationship between federal and state claims and courts, the very existence of the federal courts contemplated by Article III entails some incidental impact on the operations of state courts. Some sovereign must establish the procedures to control such interrelated proceedings; either the national government or the

[3]Justice Kennedy has suggested a state which defers in this manner the assertion of its Eleventh Amendment defense may waive that defense. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. at 395 (concurring opinion).

states must exercise this power, there is no third alternative. The decision of the Minnesota Court arrogates to that state the supreme authority to control the ground rules governing interrelated claims and proceedings, and thus to determine how litigants and even judges must proceed in federal court.

Under the process established by section 1367(d) and the Federal Rules of Civil Procedure, a federal judge is subject to no specific deadlines for determining whether to exercise jurisdiction over a pendant state claim, and ordinarily would not even address that issue until and unless the defendant had filed a motion to dismiss and the plaintiff was accorded an opportunity to respond. Section 1367(d) protects the internal operations of the federal courts by assuring that judges and litigants alike can resolve disputes about pendant state claims in an orderly manner, not driven by the impending expiration of any state limitations periods.

Under the decision below, on the other hand, Minnesota law controls the manner in which these problems must be addressed in the federal courts. Minnesota law cuts off a plaintiff's right to refile in state court a dismissed pendant claim upon the expiration of the applicable state limitation period; that cutoff applies regardless of whether a motion to dismiss has even been filed in federal court, regardless of how little time it would leave the federal judge to rule on a motion to dismiss, and regardless of whether it would expire before any federal appeal could be taken. In the instant case state law requires the filing of an action under the Minnesota Human Rights Act within 45 days after the issuance of a right to sue letter; even if a plaintiff filed a federal action on the very first day, it would be virtually impossible for a federal judge to hear and resolve in the short period that remained any disputes about pendant state claims. Nothing in this Court's Eleventh Amendment jurisprudence has suggested that either the terms of that Amendment or the priciniples of federalism accord to the states the right to interfere in this manner with the internal operations of the federal courts.

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Respectfully submitted,

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